Supreme Court, U.S.
FILED
JUL 7 2003
OFFICE OF THE CLERK

No. 02-1183

IN THE

# Supreme Court of the United States

UNITED STATES OF AMERICA,

*Petitioner*,

*vs.*

SAMUEL FRANCIS PATANE,

*Respondent*.

**On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

## BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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## QUESTIONS PRESENTED

Whether a failure to give a suspect the warnings prescribed by *Miranda* v. *Arizona*, 384 U. S. 436 (1966), requires the suppression of physical evidence derived from the suspect's unwarned but voluntary statement.

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**BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER**

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## INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a nonprofit corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case involves the suppression of evidence of a crime which is indisputably reliable, for reasons involving no actual violation of constitutional rights and of dubious value in safeguarding constitutional rights. The cost of suppression in

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

a case such as this vastly outweighs the benefits, and suppression is contrary to the interests CJLF was formed to protect.

## SUMMARY OF FACTS AND CASE

The relevant facts, as stated in the Court of Appeals' opinion, can be briefly stated. Colorado Springs police arrested defendant Samuel Patane for violation of a harassment restraining order on June 6, 2001, three days after his release from the county jail. *United States* v. *Patane*, 304 F. 3d 1013, 1014-1015 (CA10 2002). They had information that Patane was a convicted felon and that he possessed a Glock .40 caliber pistol. "Detective Benner began advising Patane of his *Miranda* rights, but only got as far as the right to silence when Patane said that he knew his rights. No further *Miranda* warnings were given, a fact which the Government concedes on appeal resulted in a *Miranda* violation." *Id.*, at 1015.[2] Upon questioning about the gun, Patane told the officers it was in his bedroom and gave them permission to retrieve it. *Ibid.*[3]

Patane was indicted in federal court for possession of a firearm by a convicted felon in violation of 18 U. S. C. § 922(g)(1). The District Court ordered that the gun be suppressed as evidence, on the ground that the police did not have probable cause to arrest Patane. *Id.*, at 1014. The Court of Appeals concluded that the police did have probable cause, but it nonetheless affirmed the suppression order on the theory that the gun was the "fruit" of the *Miranda* violation. *Ibid.*

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2. *Miranda* v. *Arizona*, 384 U. S. 436 (1966). *Amicus* CJLF does not believe that this concession was correct. See Part I, *infra*.

3. Defendant disputes that he gave permission. See Brief in Opposition 5, n. 1.



## SUMMARY OF ARGUMENT

On the facts of this case, it is doubtful whether a violation of the *Miranda* rule occurred. This Court has not ruled on the question, and other courts are divided. The issue should be expressly reserved, to be decided in a case where it is contested. The split of authority on the point, however, is relevant in that it shows that the police in this case acted in good faith and that the "bright-line" rule of *Miranda* is not as bright as advertised.

*Dickerson* v. *United States* affirmed the *Miranda* body of jurisprudence in its entirety, including the exceptions and limitations of the rule, and specifically including *Michigan* v. *Tucker* and *Oregon* v. *Elstad*.

*Miranda* is a rule developed to manage the risk that the inquiry into voluntariness of a statement might be decided incorrectly. Its conclusive presumption is doubtful even in its core area of operation and should not be extended beyond the core. The same balance of factors that led to admission of the evidence in *Tucker* and *Elstad* is present in this case, and it should produce the same result.

## ARGUMENT

### I. There may not have been a *Miranda* violation in this case.

The District Court in this case held that the rule of *Miranda* v. *Arizona*, 384 U. S. 436 (1966) was violated when the police failed to read Patane the complete warnings, despite his spontaneous assertion that he already knew his rights. See *United States* v. *Patane*, 304 F. 3d 1013, 1018 (CA10 2002). The Government did not challenge this holding in the Court of Appeals, see *ibid.*, or in its petition for certiorari. See Pet. for Cert. i. Under these circumstances, this Court will not normally decide the correctness of such a holding. See, *e.g.*, *California* v. *Hodari D.*, 499 U. S. 621, 623, n. 1 (1991). Although the

Court does on occasion consider issues raised only by *amici*, see, *e.g.*, *Mapp* v. *Ohio*, 367 U. S. 643, 646, n. 3 (1961) (Fourth Amendment raised only by *amicus*); *Teague* v. *Lane*, 489 U. S. 288, 300 (1989) (plurality opinion) (retroactivity), the present case is more like *Hodari D.* than *Teague*.

Even so, the debatable nature of the District Court's finding of a violation is important for two reasons. First, the opinion in this case should be explicit that the "violation" is merely assumed and not decided, as was done in *Hodari D.* In that case, the state conceded that the police officer did not have "reasonable suspicion" for a stop when Hodari fled at the sight of the officer. By explicitly noting that the point was conceded rather than decided, the *Hodari D.* Court kept the issue open for another case, in which another state chose to contest it. See *Illinois* v. *Wardlow*, 528 U. S. 119 (2000). The present case is a mirror image of *Colorado* v. *Spring*, 479 U. S. 564, 572, n. 4 (1987). In that case, the "fruit" question was conceded, and the case was decided on the legality of the questioning. In this case, the "fruit" question is the question presented, while the alleged *Miranda* violation should be assumed and expressly not decided. See also *Oregon* v. *Elstad*, 470 U. S. 298, 315 (1985) (custody conceded and assumed, not decided).

Second, the fact that the propriety of the officers' actions in this case was an open question at the time of the arrest, and indeed remains an open question today, may be significant. More than once in its *Miranda* jurisprudence, this Court has noted the absence of any intentional misconduct on the part of the investigating officers. See, *e.g.*, *Michigan* v. *Tucker*, 417 U. S. 433, 447-448 (1974) (noting questioning occurred before *Miranda*); *Elstad*, 470 U. S., at 309 (characterizing officer's belief that suspect was not yet in custody as "error"). The issue of intentional noncompliance is presented in another case presently before the Court, *Missouri* v. *Seibert*, No. 02-1371.

The *Miranda* opinion itself disclaimed any suggestion that the procedures laid out in it were exclusive, and alternatives were expressly allowed so long as they were equally effective.



See 384 U. S., at 467. "The purpose of the *Miranda* warnings . . . is to dissipate the compulsion inherent in custodial interrogation and, in so doing, guard against abridgment of the suspect's Fifth Amendment rights." *Moran* v. *Burbine*, 475 U. S. 412, 425 (1986). An arrestee who interrupts the police warnings to assert that he knows his rights and that the warnings are not necessary has demonstrated both the knowledge that he has rights regarding interrogation and the assertiveness necessary to stand up for his rights. The facts of this case demonstrate a *less* compulsive atmosphere than the typical case of *Miranda* compliance, where the police read rights to a passive subject and get his signature on a waiver form. If an arrestee can waive the constitutional rights protected by the *Miranda* warning procedure, it would seem very strange that he cannot waive the warnings themselves, particularly where he does so entirely spontaneously. To hold that there was a violation in this case would be to create a rule of "talismanic incantation" of the type this Court rejected long ago. See *California* v. *Prysock*, 453 U. S. 355, 359 (1981) (*per curiam*).

Courts around the nation are divided on the question of whether the arrestee's spontaneous assertion of knowledge of his rights eliminates the requirement for the police to read them. See 2 W. LaFave, J. Israel, & N. King, Criminal Procedure § 6.8(a), p. 572 (2d ed. 1999). A number of cases hold that the assertion does eliminate the warning requirement or, equivalently, that the arrestee has waived the warning. See, *e.g.*, *State* v. *Perez*, 157 N. W. 2d 162, 164 (Neb. 1968); *State* v. *Wilson*, 268 N. E. 2d 814, 817 (Ohio App. 1971); *State* v. *Thomas*, 553 P. 2d 1357, 1363 (Wash. App. 1976); *State* v. *Walden*, 336 N. W. 2d 629, 632 (N. D. 1983); *contra Dupont* v. *United States*, 259 A. 2d 355, 358-359 (D. C. 1969). While this split need not and should not be resolved in the present case, it cannot be denied that the officers' belief that their actions complied with the *Miranda* rule was supported by substantial authority.

## II. *Dickerson* reaffirmed this Court's *Miranda* jurisprudence in its entirety, including *Tucker* and *Elstad*.

The Supreme Court precedents which come closest to the present case are *Michigan* v. *Tucker*, 417 U. S. 433, 452 (1974) and *Oregon* v. *Elstad*, 470 U. S. 298, 308 (1985). In both of these cases, this Court held that "fruits" of a statement taken without complying with the *Miranda* rule were admissible. The Court of Appeals in the present case excluded the "fruits" despite these precedents by two means. First, it held that *Dickerson* v. *United States*, 530 U. S. 428 (2000) had "fundamentally altered" the law in this area and "undermined the logic underlying *Tucker* and *Elstad*." *United States* v. *Patane*, 304 F. 3d 1013, 1019 (CA10 2002). Second, the Court of Appeals read the precedents very narrowly to draw a distinction for this purpose between physical objects and living witnesses, either the defendant's own statement or the identity of another witness. See *id.*, at 1022. The first of these arguments is addressed in this part, and the second in the next part.

The Court of Appeals' thesis that *Dickerson* "fundamentally altered" the premises of important precedents is a surreal reading of that decision. *Dickerson* is a resounding affirmation of precedent. The Court made no attempt to defend *Miranda* as an initially correct decision, but instead declared that "the principles of *stare decisis* weigh heavily against overruling it now." 530 U. S., at 443. *Dickerson* quoted with approval the statement of Chief Justice Burger, concurring in the judgment in *Rhode Island* v. *Innis*, 446 U. S. 291, 304 (1980) (emphasis added), "I would neither overrule *Miranda*, disparage it, *nor extend it* at this late date." *Dickerson*, *supra*, at 443. Certainly, to undermine the limitations on *Miranda*, including *Tucker* and *Elstad*, would be to extend it. Yet *Dickerson* expressly rejected the notion that there was inconsistency between *Miranda* and the limiting decisions. "If anything, our subsequent cases have reduced the impact of *Miranda* on legitimate law enforcement while reaffirming the decision's core ruling that unwarned statements may not be used as evidence in the prosecution's



case in chief." *Id.*, at 443-444. *Dickerson* does not undermine any portion of the *Miranda* body of jurisprudence, but instead reaffirms it as a coherent whole.

To be sure, the Fourth Circuit in *Dickerson* did rely on statements in *Tucker* and other cases to the effect that *Miranda* was a prophylactic rule for its conclusion that *Miranda* was not a constitutional rule. See *United States* v. *Dickerson*, 166 F. 3d 667, 672 (CA4 1999). This reasoning could be stated as a syllogism:

> No prophylactic rules are constitutional rules.
> *Miranda* is a prophylactic rule.
> Therefore, *Miranda* is not a constitutional rule.

The Court of Appeals in the present case appears to have assumed that, in rejecting the conclusion of this syllogism, see 530 U. S., at 438, the *Dickerson* Court necessarily rejected the minor premise. The obvious alternative is that the Court rejected the major premise. It is possible for a prophylactic rule to be a constitutional requirement.

The two-witness rule for treason, see U. S. Const., Art. III, § 3, is a prophylactic rule of sorts. Certainly it does not create a substantive right to commit an act of treason which is only witnessed by one person. Like *Miranda*, it is a bright-line rule of evidence that certain evidence will be required for a particular purpose regardless of how clearly other available evidence may prove the underlying fact. This rule represents a value judgment by the Framers that the danger of erroneous conviction of treason on the word of one liar outweighs the need of the government to obtain convictions in single-witness cases. See J. Story, Commentaries on the Constitution of the United States § 943, pp. 671-672 (abridged ed. 1833) (reprint 1987). Yet this rule is in the Constitution in black and white and not subject to legislative repeal.

*Dickerson* reaffirms that the *Miranda* procedures, or equally effective alternatives, are required for the product of in-custody interrogation to be included in the prosecution's case in chief,

and that this rule is a constitutional mandate. That holding is consistent with the statements in earlier cases that characterize *Miranda* as a prophylactic rule, note that it sweeps more broadly than the Fifth Amendment itself, and state that the warnings themselves are not constitutional rights. Specifically addressing *Elstad*, *Dickerson* unmistakably holds that "refusing to apply the traditional 'fruits' doctrine" is not inconsistent with the constitutional status of *Miranda*. 530 U. S., at 441.

If that were not clear enough from the face of the *Dickerson* opinion, the recent decision in *Chavez* v. *Martinez*, 538 U. S. __ (No. 01-1444, May 27, 2003) eliminated any residual doubt. Interpretation of this precedent is complicated by the fact that there is no majority opinion. Even so, we can see from the separate opinions that *Dickerson* did not undermine the cases limiting *Miranda*, including *Tucker* and *Elstad*.

On the Fifth Amendment question, the opinions concurring in the judgment are those of Justice Thomas and Justice Souter. We need not answer the often-difficult riddle of which opinion is "narrower," see *Marks* v. *United States*, 430 U. S. 188, 193 (1977); *Nichols* v. *United States*, 511 U. S. 738, 745-746 (1994); *Grutter* v. *Bollinger*, 539 U. S. __ (No. 02-241, June 23, 2003) (slip op., at 12-13), because the two are consistent on this point. Indeed, Part I of Justice Kennedy's opinion is also consistent to the extent relevant here.

Justice Thomas' opinion reaffirms that *Miranda* is a prophylactic rule, even though it is a constitutionally required prophylactic rule. *Chavez* (slip op., at 8, 10). *Tucker* and *Elstad* are cited and relied on as precedent for the same premises that the Court of Appeals in the present case believed had been undermined by *Dickerson*. Compare *id.* (slip op., at 9), with 304 F. 3d, at 1019. "Rules designed to safeguard a constitutional right, however, do not extend the scope of the constitutional right itself, just as violations of traditionally crafted prophylactic rules do not violate the constitutional rights of any person." *Chavez* (slip op., at 10). From this post-*Dickerson* opinion, we see that *Miranda*'s status as a prophylactic rule remains intact. Asking a question of an arrestee without reading the *Miranda* warnings, by itself, is not a violation of the arrestee's rights.



Justice Souter's opinion characterizes the *Miranda* rule as "conditioning admissibility on warnings and waivers to promote intelligent choices and to simplify subsequent inquiry into voluntariness . . . ." *Id.* (slip op., at 2) (Souter, J., concurring in the judgment). This correct, complete, yet brief statement may be the best description of *Miranda* yet. "Conditioning admissibility" designates *Miranda* as a rule of evidence rather than a rule of substantive law. The policy reasons given for the *Miranda* rule imply that the rule will be limited when countervailing reasons of policy outweigh the reasons for extending the rule of exclusion. Justice Souter refers to *Miranda* as a "complementary rule," rather than a prophylactic rule, *id.* (slip op., at 3), but this variation on the traditional terminology would not seem to make any difference. Cf. *Connecticut* v. *Barrett*, 479 U. S. 523, 528 (1987) ("auxiliary barrier").

In this view, any extension of *Miranda*'s "complementary rule" must be justified by a showing that the extension is necessary because the existing remedies are insufficient to protect the core Fifth Amendment privilege. *Chavez*, *supra*, (slip op., at 3) (Souter, J., concurring in the judgment). For the reasons discussed in Part III, *infra*, *Tucker* and *Elstad* are based on the Court's judgment that extension beyond exclusion of the statement itself is not necessary. Nothing in *Dickerson* is remotely contrary to that judgment, and hence these cases are still good law.

Although Justice Kennedy's opinion is a dissent on the Fifth Amendment question, it is worth noting that this opinion is also consistent with the view that *Dickerson* did not undermine the limitations on *Miranda* established in this Court's cases. *Dickerson* established that *Miranda* is "a constitutional requirement." *Chavez*, *supra* (slip op., at 2) (Kennedy, J., concurring in part and dissenting in part). That requirement,

however. is "a rule of exclusion," *ibid.*, *i.e.*, a rule of evidence and not a rule of substantive law. The pre-*Dickerson* exceptions to *Miranda*'s rule of exclusion are alive and well. *Ibid.* (citing *Harris* v. *New York*, 401 U. S. 222 (1971)). "The exclusion of unwarned *statements*, when not within an exception, is a complete and sufficient remedy." *Ibid.* (emphasis added).

The only indication in any of the opinions in *Chavez* that *Dickerson* changed anything in the *Miranda* body of jurisprudence is a statement in footnote 3 of Justice Stevens' opinion that "the Court disavowed the 'prophylactic' characterization of *Miranda* in *Dickerson* . . . ." This opinion was not joined by any other Justice, and the statement is contrary to those in opinions joined by a majority, as discussed *supra*.

In short, *Chavez* confirms that *Dickerson* did not change the distinction drawn in prior cases between noncompliance with *Miranda* and actual coercion. The main premise of the Court of Appeals' thesis is therefore false. The physical "fruit" of the questioning of Patane can be suppressed only if *Tucker* and *Elstad* can be meaningfully distinguished or if they should be independently overruled. As we will show in the next part, those decisions were correct, and the balancing of costs and benefits that produced those decisions produces the same result here.

## III. The *Miranda* rule is a device for allocating the risk of uncertainty that is doubtful even in its core area of operation, and it should not be extended anywhere outside the core.

### *A. Miranda As Risk Management.*

"In *Miranda* [v. *Arizona*, 384 U. S. 436 (1966)], the Court noted that reliance on the traditional totality-of-the-circumstances test raised a *risk* of overlooking an involuntary custodial confession, 384 U. S., at 457, a risk that the Court found



unacceptably great when the confession is offered in the case in chief to prove guilt." *Dickerson* v. *United States*, 530 U. S. 428, 442 (2000) (emphasis added). This statement captures the essence of the *Miranda* rule, whether it be called a "prophylactic rule," a "complementary rule," or an "auxiliary barrier." Simply taking a statement from an arrestee without reading warnings is not wrong in itself. The problem is the risk that the voluntariness inquiry might be answered incorrectly. "A *Miranda* violation does not *constitute* coercion, but rather affords a bright-line, legal presumption of coercion . . . ." *Oregon* v. *Elstad*, 470 U. S. 298, 307, n. 1 (1985) (emphasis in original).

In the artificial atmosphere of law school, students typically take the facts as given and discuss at length what result should follow from those facts. The real world is considerably messier. Rules of law must be fashioned with the knowledge that the fact-finding process is fallible. In cases where error in one direction is thought to cause a greater injustice than error in the other, rules may be shaped to minimize the probability of the former error at the cost of multiplying the latter errors. The prosecution's heavy burden of proof beyond a reasonable doubt in criminal cases is expressly premised on the belief "that it is better that ten guilty persons escape, than that one innocent suffer." 4 W. Blackstone, Commentaries 352 (1st ed. 1769); see also *In re Winship*, 397 U. S. 358, 364 (1970). And escape they do, on a regular basis. See, *e.g.*, *Rufo* v. *Simpson*, 86 Cal. App. 4th 573, 103 Cal. Rptr. 2d 492 (2001) (defendant acquitted of double murders in criminal trial, found in subsequent civil trial to have actually committed them).

A second circumstance that may justify a bright-line rule is when the uncertainty in the evidence could easily have been avoided by the party on the losing side of the bright line. The statute of frauds is such a rule. A party who wants to be sure he can enforce important contracts can simply get them in writing, but there is no simple way to protect oneself against false claims of oral contracts. The law protects against the risk of

false claims of oral contracts by making them unenforceable for certain important matters, see, *e.g.*, Cal. Civ. Code § 1624(a), knowing that the cost will be that some genuine contracts are not enforced. The cost is acceptable, because people can easily guard against it.

The bright-line rule of *Miranda* has elements of both of these rationales:

> "In these cases, we might not find the defendants' statements to have been involuntary in traditional terms. Our concern for adequate *safeguards* to protect precious Fifth Amendment rights is, of course, not lessened in the slightest. In each of the cases, the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures. The *potentiality* for compulsion is forcefully apparent. . . . The fact remains that in none of these cases *did the officers undertake* to afford appropriate safeguards at the outset of the interrogation to *insure* that the statements were truly the product of free choice." 384 U. S., at 457 (emphasis added).

The *Miranda* Court's concern for the "potentiality of compulsion" would not be an issue if courts were capable of infallible determination of actual compulsion. The uncertainty of that determination is what makes necessary *Miranda*'s procedures to "insure" voluntariness. *Miranda* "concluded that the coercion inherent in custodial interrogation *blurs the line* between voluntary and involuntary statements, and thus heightens the *risk* that an individual will not be 'accorded his privilege under the Fifth Amendment . . . not to be compelled to incriminate himself.' " *Dickerson*, 530 U. S., at 435 (emphasis added) (quoting *Miranda*, *supra*, at 439).

Why is an error in determining voluntariness so much worse in one direction than the other that it justifies placing such a heavy thumb on the scales of justice? This is not a simple question, because the self-incrimination privilege embodies many values. See *Withrow* v. *Williams*, 507 U. S.



680, 691-692 (1993). Certainly one of the most important, though, is the danger that a coerced confession, erroneously determined to be voluntary, can result in the conviction of an innocent person.

> "Nor does the Fifth Amendment 'trial right' protected by *Miranda* serve some value necessarily divorced from the correct ascertainment of guilt. ' "[A] system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses" than a system relying on independent investigation.' *Michigan* v. *Tucker*, *supra*, at 448, n. 23 (quoting *Escobedo* v. *Illinois*, 378 U. S. 478, 488-489 (1964)). By bracing against 'the possibility of unreliable statements in every instance of in-custody interrogation,' *Miranda* serves to guard against 'the use of unreliable statements at trial.' *Johnson* v. *New Jersey*, 384 U. S. 719, 730 (1966) . . . ." *Id.*, at 692.

Concern about the reliability of out-of-court confessions is similarly evident in the Treason Clause, which accepts only a "Confession in open Court" as a substitute for the two witnesses. U. S. Const., Art III, § 3.

> "It has been well remarked, that confessions are the weakest and most suspicious of all testimony; ever liable to be obtained by artifice, false hopes, promises of favour, or menaces; seldom remembered accurately, or reported with due precision; and incapable, in their nature, of being disproved by other negative evidence." J. Story, Commentaries on the Constitution of the United States § 943, pp. 671 (abridged ed. 1833) (reprint 1987).

Modern technology may be able to mitigate these concerns. Video recording of the entire interrogation, including both the questioner and the suspect, could be an effective alternative, such as the *Miranda* doctrine has contemplated from the beginning. See *Dickerson*, 530 U. S., at 440; P. Cassell, How Many Criminals Has *Miranda* Set Free?, Wall Street Journal,

Mar. 1, 1995, p. A17. Even without alternatives, however, the balance struck by *Miranda* must be reconsidered when a defendant seeks to apply the rule of exclusion to a situation where the danger of false evidence is not present. Where the adverse effects of erroneous admission of an involuntary confession are reduced, the adverse effects of erroneous exclusion of a voluntary confession have relatively more weight. See *infra*, at 17.

The second rationale implicit in the *Miranda* rule is the ability of the police to clarify the voluntariness issue by complying with the *Miranda* requirements. The passage quoted above puts the onus on the officers to "undertake to afford appropriate safeguards . . . ." The police are in control of the interrogation, and in most cases they know the *Miranda* requirements and are able to comply with them. While *Miranda* compliance does not guarantee that the interrogation will withstand a voluntariness challenge, the cases where it will not are "rare." *Dickerson*, 530 U. S., at 444 (quoting *Berkemer* v. *McCarty*, 468 U. S. 420, 433, n. 20 (1984)). This rationale loses some of its force in those situations where the *Miranda* line is not as bright as originally advertised. The *Withrow* Court acknowledged this problem when it referred to "*Miranda*'s bright-line (or, at least, brighter-line) rules . . . ." 507 U. S., at 694. Among these dim zones are the unresolved legal questions, such as the present case, see Part I, *supra*, and the perennially "slippery" definition of "custody." *Oregon* v. *Elstad*, 470 U. S. 298, 309 (1985); see also *Withrow*, *supra*, at 684-685 (state and federal courts disagreed on custody).

*B. The High Price of Conclusive Presumptions.*

The *Miranda* rule employs a particularly drastic measure to minimize the risk of an erroneously admitted involuntary confession. Justice Harlan called it "heavy-handed and one-sided." *Miranda*, 384 U. S., at 525 (dissent). *Miranda* creates a conclusive presumption that any in-custody statement taken without complying with its procedures is coerced. See *With-*



*row*, 507 U. S., at 712 (O'Connor, J., dissenting). Conclusive presumptions, also known as *per se* rules and bright-line rules, are rarely warranted when considered purely on their logical merits.

> " '*Per se* rules . . . require the Court to make broad generalizations . . . . Cases that do not fit the generalizations may arise, but a *per se* rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them.' *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U. S. 36, 50, n. 16 (1977).
>
> "*Per se* rules should not be applied, however, in situations where the generalization is incorrect as an empirical matter; the justification for a conclusive presumption disappears when application of the presumption will not reach the correct result most of the time." *Coleman* v. *Thompson*, 501 U. S. 722, 737 (1991).

If the *Miranda* presumption were evaluated on *Coleman*'s criterion, it would fail dramatically. "[P]atently *voluntary* statements taken in violation of *Miranda* must be excluded from the prosecution's case . . . ." *Elstad*, 470 U. S., at 307 (emphasis in original). As the *Miranda* Court implicitly recognized, there are many circumstances under which a suspect can give an unwarned, but still clearly voluntary custodial confession. In his dissent, Justice White made the point explicitly.

> "Although in the Court's view in-custody interrogation is inherently coercive, the Court says that the spontaneous product of the coercion of arrest and detention is still to be deemed voluntary. An accused, arrested on probable cause, may blurt out a confession which will be admissible despite the fact that he is alone and in custody, without any showing that he had any notion of his right to remain silent or of the consequences of his admission. Yet, under the Court's rule, if the police ask him a single question such as 'Do you

> have anything to say?' or 'Did you kill your wife?' his response, if there is one, has somehow been compelled, even if the accused has been clearly warned of his right to remain silent. Common sense informs us to the contrary." *Miranda*, 384 U. S., at 533-534 (White, J., dissenting).

Judge Henry Friendly's public response to *Miranda* underscored the practical soundness of Justice White's hypothesis. "[T]he books are full of instances, of which the Court must have been well aware through petitions for certiorari, where it is evident that in-custody interrogation did not represent the exercise of compulsion." H. Friendly, Benchmarks 272-273 (1967). Next, Judge Friendly lists four then-recent cases in which there was no question that the custodial interrogation produced a voluntary confession. See *id.*, at 273, nn. 33-36 (citing *United States* v. *Cone*, 354 F. 2d 119 (CA2 1965); *United States* v. *Indiviglio*, 352 F. 2d 276 (CA2 1965); *Evalt* v. *United States*, 359 F. 2d 53 (CA9 1966); *United States* v. *D'Allesandro*, 361 F. 2d 694, 698 (CA2 1966)). In the years since *Miranda*, this Court has often found confessions to be voluntary even though they were taken contrary to the *Miranda* procedures. See, *e.g.*, *Elstad*, 470 U. S., at 312; *Oregon* v. *Hass*, 420 U. S. 714, 722 (1975); *Michigan* v. *Tucker*, 417 U. S. 433, 449 (1974); *Harris* v. *New York*, 401 U. S. 222, 224 (1971).

The downside of any conclusive presumption is that it disables the party disadvantaged by it from proving that the underlying, presumed fact is not true, regardless of how compelling a case he may have to disprove that "fact." Such presumptions are so inherently unfair that this Court has completely banned their use against defendants in criminal cases. See *Carella* v. *California*, 491 U. S. 263, 265 (1989) (*per curiam*). Yet *Miranda* construed the Constitution to require the same kind of presumption that *Carella* and *Sandstrom* v. *Montana*, 442 U. S. 510 (1979) construed it to prohibit.



"The disadvantage of the *Miranda* rule is that statements which may be by no means involuntary, made by a defendant who is aware of his 'rights,' may nonetheless be excluded and a guilty defendant go free as a result." *Dickerson*, 530 U. S., at 444. This is no small disadvantage. For a murderer or rapist who could have been incapacitated to go back on the street and prey upon more victims is a horrific cost.

*C. The Subtle Balance.*

Whether the benefits of *Miranda* justify the costs even within the rule's core area of application was hotly debated in the *Miranda* decision itself, with dissenting Justices Harlan and White making a strong case that they do not. See also Cassell & Fowles, Handcuffing the Cops? A Thirty-Year Perspective on *Miranda*'s Harmful Effects on Law Enforcement, 50 Stan. L. Rev. 1055 (1998).

*Moran* v. *Burbine*, 475 U. S. 412, 426 (1986) referred to the "subtle balance struck in [the *Miranda*] decision." The cases since *Miranda* confirm that the costs and benefits are close to balance in *Miranda*'s core area. That is why proposals to extend the *Miranda* rule to areas where the costs are greater or the benefits are less have been largely rejected.

*Harris* v. *New York*, *supra*, is the first case in this line. Relying on a Fourth Amendment precedent, the Court permitted a statement taken without *Miranda* warnings to be used for impeachment. The additional deterrent effect of forbidding such use was not worth the additional cost of giving the defendant a license to commit perjury. See 401 U. S., at 225-226. *Michigan* v. *Tucker*, *supra*, similarly concluded that the marginal benefit of extending the *Miranda* exclusionary rule to a witness (Henderson) identified in the defendant's statement was not significant. The principal basis for this assessment was the fact that the manner of obtaining Tucker's statement had no bearing whatsoever on the reliability of Henderson's testimony. See 417 U. S., at 448-449. On the other side of the balance, as always, was "the strong interest under any system of justice of

making available to the trier of fact all concededly relevant and trustworthy evidence which either party seeks to adduce." *Id.*, at 450. The reduced need for an exclusion sanction was insufficient to outweigh the need for reliable evidence in *Tucker*. See *id.*, at 451. *Oregon* v. *Hass*, *supra*, reaffirmed *Harris* on similar grounds. 420 U. S., at 722.

*New York* v. *Quarles*, 467 U. S. 649 (1984) made an exception to the *Miranda* rule for questioning needed to prevent further harm rather than merely to gather evidence of past harm. The exception is premised squarely on a weighing of the opposing dangers. "We conclude that the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination."[4] *Id.*, at 657.

*Berkemer* v. *McCarty*, 468 U. S. 420, 437 (1984) declined to extend the *Miranda* warning requirement to traffic stops, even though they do come within *Miranda*'s description of custody—" 'otherwise deprived of his freedom of action in any significant way.' " *Id.*, at 435 (emphasis omitted). The atmosphere of compulsion is considerably less in such a stop, diminishing the need for warnings. See *id.*, at 437-439. *Illinois* v. *Perkins*, 496 U. S. 292 (1990) reached the same result for largely the same reason where the questioner is an undercover agent posing as a fellow prisoner. *Id.*, at 296-297.

The only area where *Miranda* has been expanded beyond its original boundaries is the issue of questioning for a different offense after invocation of rights, and even here the record is mixed. *Michigan* v. *Mosley*, 423 U. S. 96, 104-106 (1975) held that after an arrestee invokes his right to remain silent, it is

4. Justice O'Connor, concurring in part and dissenting in part, would have suppressed Quarles' statement as to where the gun was located, but not the gun itself, anticipating the question in the present case. See *id.*, at 669 (distinguishing "testimonial aspects of the accused's custodial communications" from nontestimonial aspects).



perfectly proper to approach him hours later, give new warnings, obtain a waiver, and ask questions about an unrelated offense. A contrary rule would increase the cost of *Miranda* safeguards and "transfer [them] into wholly irrational obstacles to legitimate police investigative activity . . . ." *Id.*, at 102. Yet the Court did exactly that in *Arizona* v. *Roberson*, 486 U. S. 675, 682-683 (1988), where the only difference was that the arrestee had asked to have a lawyer before answering questions rather than refusing to answer questions at all. See *id.*, at 678; but see *id.*, at 692-693 (Kennedy, J., dissenting) (similarity to *Mosley*).

*Roberson* was an anomaly the day it was decided, extending *Edwards* v. *Arizona*, 451 U. S. 477 (1981) to a situation where "[t]he problems to which *Edwards* was addressed are not present . . . in any substantial degree." *Id.*, at 693 (Kennedy, J., dissenting). It is even more anomalous since *McNeil* v. *Wisconsin*, 501 U. S. 171, 175 (1991) held, and *Texas* v. *Cobb*, 532 U. S. 162, 167 (2001) confirmed, that the analogous Sixth Amendment rule is "offense specific." In an appropriate case, *Roberson* should be reconsidered. For now, it is sufficient to note that the successive questioning cases are a singular exception to the rule. In all other areas, any variation from the core of *Miranda* that tips the balance in any degree against exclusion has resulted in the evidence being admitted.

*D. Tucker, Elstad, and "Fruit."*

This brings us back to the starting point—whether the present case can be meaningfully distinguished from *Tucker* and *Elstad*. In *Tucker* it was clear, and in the present case and *Elstad* it is assumed, that there was "a disregard, albeit an inadvertent disregard, of the procedural rules . . . established in *Miranda*. The question for decision is how sweeping the judicially imposed consequences of this disregard shall be." *Tucker*, 417 U. S., at 445.

*Tucker* rests on three premises. "Where the official action was pursued in complete good faith . . . the deterrence rationale

[for exclusion] loses much of its force." *Id.*, at 447. In *Tucker* the "violation" occurred before *Miranda*. See *ibid.* In the present case, it involved a question of law which is unsettled to this day. See Part I, *supra*. As noted, *supra*, at 17, the reliability of the evidence was not impaired in *Tucker*, as it is not in the present case. Finally, *Tucker* noted that the defendant's own statements were not being introduced in evidence, see *id.*, at 449-450, as they are not in this case. The weights on the two sides of the balance are exactly the same in this case as in *Tucker*.

*Oregon* v. *Elstad*, *supra*, rejected a "fruits" claim that was considerably stronger than the claim in the present case. As Justice Brennan noted in dissent, the psychological connection between an initial confession and a subsequent one is substantial, due to the "hopeless feeling of an accused that he has nothing to lose by repeating his confession, even when the circumstances that rendered his first confession illegal have been removed." 470 U. S., at 325.

The *Elstad* majority's rejection of the exclusion sanction is not based on any special status of subsequent confessions, because these are the most suspect of all "fruits." Instead, *Elstad* holds that "the *Miranda* presumption, though irrebuttable for purposes of the prosecutor's case in chief, does not require that the statements *and their fruits* be discarded as inherently tainted." *Id.*, at 307 (emphasis added). *Elstad* goes on to say that *Tucker*'s refusal to import the Fourth Amendment "fruit of the poisonous tree" doctrine into *Miranda* "applies with *equal* force when the alleged 'fruit' of a noncoercive *Miranda* violation is neither a witness nor an *article of evidence* but the accused's own voluntary testimony." *Id.*, at 308 (emphasis added). Equal means equal; equal does not mean greater. The Court of Appeals in the present case stressed that *Elstad* went on to quote a Fourth Amendment case drawing a distinction between objects and witnesses. See 304 F. 3d, at 1021. This reasoning makes too much of a make-weight argument in the *Elstad* opinion. The main reasons given for



admitting the "fruit" in *Elstad* are the absence of actual compulsion and the reliability of the evidence, factors which are at least as strong, if not stronger, when the "fruit" is physical evidence.

A case is controlling precedent for a later case if the two are the same in their material facts, and we look to the opinion to see which facts the court deemed material. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Grutter* v. *Bollinger*, No. 02-241, p. 7. The *Elstad* opinion does not deem it material which kind of "fruit" is involved; it considers them equal for this purpose.

*Elstad* is controlling precedent. The gun is admissible in evidence.

## CONCLUSION

The decision of the Court of Appeals for the Tenth Circuit should be reversed.

July, 2003

Respectfully submitted,

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